

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE SHELLEY C. CHAPMAN  
UNITED STATES BANKRUPTCY JUDGE

## APPEARANCES:

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1 (Time Noted: 11:13 a.m.)

2 THE COURT: All right folks, I think since you  
3 came in a little later you need to give your cards to the  
4 court reporter.

5 All right, I'm ready when you are.

6 MS. LAWRENCE: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MS. LAWRENCE: My name is Andrea Lawrence. This  
9 is my colleague, Teresa Daley. We represent Broadway Metro  
10 Associates. Broadway Metro is a creditor of the debtor as  
11 well as the landlord of the premises in which the debtor is  
12 currently occupying at 2626 Broadway in New York, New York.

13 We are here with respect to our motion to vacate  
14 the automatic stay and we believe that there's good cause  
15 that exists, or alternatively, it was filed in bad faith.  
16 First off, our client, Broadway Metro, already terminated the  
17 lease by virtue of a notice of termination back in June of  
18 2010. It was effective on June 28th.

19 So pretty much it's our position that the debtor  
20 no longer has any --

21 THE COURT: When you say -- let me stop you, --

22 MS. LAWRENCE: Uh-huh, (affirmative).

23 THE COURT: -- because I really want to try to  
24 understand the facts here.

25 MS. LAWRENCE: Sure.

1 MS. LAWRENCE: It was a notice. I believe it was  
2 sent on June 22nd or June 23rd of 2010 and it effectively  
3 terminated as of June 28th of 2010.

4 THE COURT: And you say effectively terminated on  
5 June 28th?

6 MS. LAWRENCE: It was a notice of termination by -  
7 - that was sent pursuant to the lease.

8 THE COURT: Okay.

9 MS. LAWRENCE: And I can backtrack if Your Honor  
10 needs me to do so. There's been about eight litigations  
11 going back and forth since 2008 between the debtor and our  
12 client. Our client has pretty much been successful with  
13 respect to all the motions. Everything it's prevailed upon  
14 except for one technicality in civil court. Where we left  
15 off there was a Yellowstone Injunction. It was the third  
16 Yellowstone injunction action.

17 THE COURT: Explain to me what a Yellowstone  
18 injunction is.

19 MS. LAWRENCE: A Yellowstone Injunction is when a  
20 tenant is in default of its lease obligation the landlord  
21 will serve a notice of default upon the tenant. The tenant  
22 then can either do nothing and be subject to going to civil  
23 court to fight its leasehold rights.

24 Or it can make what's called a Yellowstone  
25 injunction. And that's essentially an application to the

1 Supreme Court to toll its rights to cure pending a hearing.  
2 Usually it's a full-blown hearing with witnesses for the  
3 court to determine whether or not the tenant actually has the  
4 ability and desire to cure. It's usually only offered to  
5 commercial tenants.

6 So what happened here is, our client had served  
7 three notices of default upon this tenant in April of 2010.  
8 The grounds on the notices were failure to provide access,  
9 failure to maintain insurance for the property, and failure  
10 to cure -- there's a couple of outstanding ECB violations on  
11 the building.

12 They made a Yellowstone application that was heard  
13 before Judge Branston (phonetic) in the State Supreme Court  
14 in June of 2010 in support of a hearing. After which, Judge  
15 Branston denied their application for Yellowstone Injunction.  
16 At which point we -- or our client moved in civil court,  
17 brought a holdover proceeding.

18 After they had already terminated -- or that they  
19 had already terminated the lease, the tenant did not vacate  
20 and then they brought a proceeding in civil court to have the  
21 tenant removed from the property. What happened with respect  
22 to that action that was heard before the civil court in  
23 August of 2010, the debtor attempted to get that case  
24 dismissed by was unsuccessful and Judge Goin (phonetic)  
25 awarded the landlord a possessory judgment. Before we could

1 execute upon the warrant, the tenant filed for bankruptcy  
2 protection on September 3rd.

3 THE COURT: All right, so they're taking the  
4 position that -- and I did read the papers, but it's a --

5 MS. LAWRENCE: Okay.

6 THE COURT: -- bit of a saga. So that's why --

7 MS. LAWRENCE: It's a -- right, it's a very long  
8 and protracted history.

9 THE COURT: -- that's why I wanted to hear about  
10 it again today. They're taking the position that because  
11 there was not a warrant of eviction issued that their rights  
12 under the lease are not yet cut off.

13 MS. LAWRENCE: Right. It's our -- right. And  
14 it's our position, and we quoted to a case, *In Re Seven Stars*  
15 *Restaurant* that notwithstanding warrant -- the fact that the  
16 warrant of eviction had not yet issued, by virtue of the fact  
17 that Broadway Metro sent out a notice of termination pursuant  
18 to the lease under (indiscernible) bankruptcy laws, that that  
19 lease was effectively terminated on June 28th and that the  
20 debtor no longer has any rights to the premises, possessory,  
21 legal, or equitable rights.

22 THE COURT: All right. This is going to take a  
23 while, but I wanted to hear --

24 MS. LAWRENCE: Yeah. Oh sure.

25 THE COURT: -- and basically I consider that

1 initial statement and then I want to hear from the debtor.

2 Because, I mean off the top, you're not paying rent.

3 MS. LAWRENCE: And they haven't paid. I hate to  
4 interrupt. They haven't paid rent since August -- I think  
5 August of 2008.

6 THE COURT: All right. So you're not paying  
7 rent. You -- you know, even if everything that you say is  
8 true, in order for you to be entitled to stay here, you have  
9 to pay rent. What am I missing?

10 MR. LEINWAND: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. LEINWAND: Robert Leinwand of Robinson Brog.  
13 With me is my partner, Robert Sasloff. Several prongs of the  
14 application of the landlord, procedurally a lot of defects  
15 with respect of filing a motion to dismiss without serving  
16 all parties, without giving the 21 days as required, motion  
17 to modify the stay without serving the requisite parties.

18 THE COURT: Who did she serve?

19 MR. LEINWAND: She served five or six people, not  
20 pursuant to, I guess it's Bankruptcy Rule 4011 which requires  
21 service upon the 20 largest or people who've filed notices of  
22 appearance. She -- the landlord filed -- in her motion she  
23 has CC'd the motion upon --

24 MS. LAWRENCE: Your Honor, I can tell you who --  
25 where --

1 THE COURT: Well let him finish --

2 MS. LAWRENCE: Okay.

3 THE COURT: Let him finish the initial list --

4 MR. LEINWAND: Yeah, but --

5 THE COURT: -- and then I'll hear yours.

6 MR. LEINWAND: Okay. So, I mean procedurally,  
7 that's the problem.

8 THE COURT: That's why you're not paying rent?

9 MR. LEINWAND: No. No. I'm just -- I'm getting  
10 beyond that because Your Honor cut to the underbelly of the  
11 whole argument. With respect to the bad faith and with  
12 respect to whether or not *Seven Stars*, which was a 1990  
13 decision by Judge Schwartzberg (phonetic) which has not been  
14 followed by Judge Brosman (phonetic) in *MAS* and by Judge  
15 Gropper (phonetic) in *P.J. Clark* following the Second Circuit  
16 clearly indicates that we have the right to resurrect. We  
17 filed a timely notice of appeal. So we win on all of those  
18 bases. I'm fully cognizant of that and I'm not going to say  
19 very much other than that. The underbelly --

20 THE COURT: You --

21 MR. LEINWAND: -- the underbelly --

22 THE COURT: -- but you -- your position is that  
23 you win?

24 MR. LEINWAND: Yeah. Well, I believe that the law  
25 so provides that we have a right under 541, a property right

1 that is protected by the automatic stay. That we will  
2 prevail with respect of --

3 THE COURT: All right. So, --

4 MR. LEINWAND: -- of those two motions.

5 THE COURT: -- so that's one bucket. So --

6 MR. LEINWAND: Okay. The real problem in this  
7 case is that the debtor has been thwarted in its operation of  
8 the business. The debtor has been thwarted because of the  
9 landlord's refusal to accept a subtenant. That subtenant,  
10 Urban Outfitters, would have provided the debtor with, over  
11 the term of the lease, \$25 million, over and above his  
12 obligations to the landlord. That -- there is an action  
13 pending in the state court seeking damages with respect to  
14 those actions.

15 The landlord had received a security deposit in  
16 excess of \$1.1 million, 525,000 of those has been taken and  
17 applied with respect to an option to purchase the premises.  
18 But we do not know about the other monies there. We have no  
19 problem with respect of getting an accounting and allowing  
20 the use of those monies towards the obligations pursuant to  
21 365(d)(3), which Your Honor alluded to and I know that is a  
22 precondition to continuing of the operations.

23 Under these circumstances two things. One,  
24 365(d)(3) authorizes this Court to forgive the performance  
25 for the first 60 days of those obligations. Those 60 days

1 have not yet been reached. Two, the debtor has --

2 THE COURT: What's the date of the filing?

3 MR. LEINWAND: September 3rd of this year.

4 The debtor has indicated that it would pay the  
5 landlord the costs of maintaining the premises. That is  
6 paying the real estate taxes, that is paying the  
7 superintendent, and that is paying the insurance on the  
8 property, which would maintain the status quo pending a  
9 resolution as to whether or not there is a lease in  
10 existence.

11 The difficulty with this case is that the landlord  
12 is saying there is no lease and yet wants to be paid the rent  
13 reserved under the lease that doesn't exist. The debtor is  
14 claiming there is a lease and is being required to pay money  
15 which it doesn't presently have.

16 The principal of the landlord [sic] is willing to  
17 make a capital contribution to assure that the landlord will  
18 not suffer any diminution in value, by maintaining the  
19 premises pending a resolution as to whether or not there is  
20 in existence a lease. Because the debtor believes, and  
21 obviously the landlord believes, that this property has  
22 substantial value and the debtor is attempting to maintain  
23 that value.

24 THE COURT: But to what end? What's the plan  
25 going to be here?

1                   MR. LEINWAND: The debtor has been attempting, and  
2 was successful to a degree, in leasing it to a triple A  
3 tenant, Urban Outfitter, which subsequently have moved across  
4 the street and is very profitable and operating profitably.  
5 And it believes that it can be able to either assume the  
6 lease with the appropriate funding by third parties to pay  
7 all of the arrearages under the lease and either maintain the  
8 lease for itself or assume and assign the lease to a third  
9 party, which third party will operate this lease which exists  
10 for an additional 44 years. So that we have a building which  
11 -- which when I went to law school was a movie theater down  
12 the block, and now is being converted into retail space. The  
13 retail space --

14                  THE COURT: You think someone in this economy is  
15 going to take an assumption of a 44 year lease?

16                  MR. LEINWAND: I think so. I think that this  
17 property has significant value and --

18                  THE COURT: It obviously does or you folks  
19 wouldn't be fighting over it so --

20                  MR. LEINWAND: And it's on Broadway. It's on the  
21 upper west side. It is a large building for a large retail  
22 area. And accordingly, there is value to it.

23                  The landlord has prevented the debtor from going  
24 to the building department and the building department will  
25 not allow the debtor to renew permits, to amend plans,

1 because the landlord has placed a hold on all of that. So  
2 that we are in a position where we are in a limbo state  
3 because there is a cloud as to the existence of the lease.

4                 The landlord believes that the gravamen of the  
5 nonmonetary default that was found by the State Court was the  
6 lack of insurance. The landlord believes that there was  
7 always insurance on the premises. Not only was there  
8 insurance on the premises, but that the landlord had in fact  
9 utilized a portion of the security deposit to maintain  
10 insurance on the premises and never advised the State Court  
11 that there was insurance on the premises. And the basis for  
12 the State Court deeming that there was a default was the lack  
13 of insurance. When in fact, there was insurance on the  
14 premises and that insurance was in fact a curable default.

15                 That's what Yellowstone's all about. Yellowstone  
16 injunctions are injunctions that enjoin the exercise of  
17 landlord's rights when there are nonmonetary defaults. The  
18 insurance was a nonmonetary default.

19                 The State Court deemed that the lack of insurance  
20 was a noncurable default because there was a time when no  
21 insurance was on the premises and during that period of time  
22 anything could have happened and you can't now cure by doing  
23 that. When in fact, the debtor believes -- and we have  
24 issued appropriate subpoenas to the landlord, to the  
25 insurance carriers, and to the brokers to determine that

1 there was in fact insurance on the premises.

2 THE COURT: All right. Let me go back to  
3 365(d)(3), all right. So the statute says that I can extend  
4 for cause the time for performance that arises within the 60  
5 days after the date of the order for relief, but the time for  
6 performance shall not be extended beyond such 60-day period.

7 Right?

8 MR. LEINWAND: That's what it says, Your Honor.

9 THE COURT: Okay. So even assuming that I were  
10 to find that cause exists -- which I'm not at all convinced  
11 as I'm sitting here now that cause exists -- but even if I  
12 were to find that cause exists, that means that the debtor  
13 would have to become current on the 60th day. Right?

14 MR. LEINWAND: The debtor would have to become  
15 current on the 60th day.

16 THE COURT: Would have to cure the whole post-  
17 petition?

18 MR. LEINWAND: That's correct, Your Honor. That's  
19 what the statute says.

20 THE COURT: That's what the statute says. I have  
21 to follow the statute.

22 MR. LEINWAND: There -- without dancing around too  
23 much, if we --

24 THE COURT: You're dancing. You got to, you  
25 know, you can't --

1 MR. LEINWAND: The first --

2 THE COURT: You can't dance because the statute  
3 says --

4 MR. LEINWAND: Well you can dance a little bit.

5 THE COURT: -- what it says.

6 MR. LEINWAND: You can dance a little bit.

7 THE COURT: I can only dance on the cause.

8 MR. LEINWAND: You can dance on 363(d)(3) also  
9 (indiscernible) sub (indiscernible) rent. You know, we filed  
10 on the 3rd. Rent is due on the 1st. The first month rent is  
11 in fact the administrative expense. It's not a 363(d)(3)  
12 expense, and therefore what happens is on the 60th day after  
13 the filing our obligation would not be to pay September, but  
14 would be to pay October and November.

15 THE COURT: So October and November. What's it,  
16 \$48,000 a month?

17 MR. LEINWAND: That's correct. That'd be --

18 MS. LAWRENCE: It's actually \$48,250.

19 MR. LEINWAND: It's --

20 THE COURT: I was rounding.

21 MR. LEINWAND: Ninety-six thousand, five --

22 THE COURT: Ninety-six thousand (96,000).

23 MR. LEINWAND: -- hundred dollars (\$96,500).

24 THE COURT: Right. So on November 1st, that's  
25 what he would have to come --

1 MR. LEINWAND: Well on November 3rd -- on November  
2 5th, whatever --

3 THE COURT: Okay.

4 MR. LEINWAND: -- it is, we'd have to come up with  
5 --

6 THE COURT: Right. On the 60th day --

7 MR. LEINWAND: On the 60th day --

8 THE COURT: -- you have to come up with --

9 MR. LEINWAND: -- we would have to come up with  
10 \$96,000.

11 THE COURT: All right.

12 MR. LEINWAND: Based upon your reading of the  
13 statute. Unless -- unless Your Honor would use equitable  
14 powers because of the facts and circumstances of this case  
15 when in fact the debtor is alleging that it is here because  
16 of the landlord's actions. And further that the landlord has  
17 a security deposit of \$1.1 million which can be used. And in  
18 lieu of the payment of the rent, Your Honor could grant to  
19 the landlord an administrative expense to which the debtor  
20 would not object to that administrative expense fixed at the  
21 rent reserve under the least, the full \$48,250.

22 THE COURT: Okay. Let me hear from Miss Lawrence.

23 MS. DALEY: Your Honor, I'm Teresa Daley and if I  
24 could respond?

25 THE COURT: Yes, Miss Daley.

1 MS. DALEY: First of all, counsel indicates that  
2 we're holding a security deposit of over a million dollars.  
3 Well maybe because counsel is new to this case, and I've been  
4 dealing with it now for quite some time, that statement is  
5 inaccurate. There was initially a security deposit posted  
6 when the lease was first entered into.

7 THE COURT: Which was what date, Miss Daley?

8 MS. DALEY: That was at the end of 2006.

9 THE COURT: Okay.

10 MS. DALEY: And then in 2008 -- in August of 2008  
11 the debtor decided that they were going to stop paying rent.  
12 They weren't complying with other provisions of the lease.  
13 The lease had a provision in there that gave them an option  
14 to purchase the property. So under the terms of that option  
15 provision they had to pay a deposit on a contract. And the  
16 parties agreed at that time to take \$500,000 and to take it  
17 from the security deposit and apply it to their contract  
18 deposit, leaving approximately \$500,000 left. The contract  
19 that --

20 THE COURT: Do you have correspondence that  
21 reflects that?

22 MS. DALEY: Oh yes, Judge.

23 THE COURT: Is that anywhere in the --

24 MS. DALEY: It's not in the papers --

25 THE COURT: -- in the submission?

1 MS. DALEY: Because --

2 THE COURT: Okay.

3 MS. DALEY: -- we didn't believe that this --

4 THE COURT: Okay.

5 MS. DALEY: -- was going to come up at this --

6 THE COURT: All right.

7 MS. DALEY: -- moment.

8 MR. LEINWAND: We acknowledge that, Your Honor, so

9 --

10 THE COURT: Okay. Very well.

11 MS. DALEY: And then after that --

12 THE COURT: Right.

13 MS. DALEY: -- when the contract to purchase the  
14 building -- the debtor, whose sole principal is Mr. John Soto  
15 (phonetic) who is not a novice here and has a lot of  
16 experience running through the court system, both state and  
17 federal, because he also had his own bankruptcy years ago,  
18 didn't comply with the contract, defaulted, didn't appear for  
19 closing. And that was litigated before State Court. And per  
20 State Court order, we were entitled to keep the 500,000 for  
21 breach of the contract --

22 THE COURT: Okay. So then --

23 MS. DALEY: -- to purchase the building.

24 THE COURT: -- you have the remainder of the  
25 security deposit.

1 MS. DALEY: Then we have 500,000 left.

2 THE COURT: Right.

3 MS. DALEY: But then again --

4 THE COURT: He's not paying rent.

5 MS. DALEY: -- he hadn't paid rent from August of  
6 2008. So at some point, I believe it was in 2009 or the  
7 beginning of 2010, I don't have the date in front of me, the  
8 landlord drew down on the bal- -- on what was left on the  
9 security --

10 THE COURT: And that was pursuant to the lease?

11 You were --

12 MS. DALEY: Correct.

13 THE COURT: -- permitted to do that?

14 MS. DALEY: Correct. So we did that.

15 THE COURT: So it's gone?

16 MS. DALEY: So it's gone. So there is no security  
17 deposit --

18 THE COURT: Okay.

19 MS. DALEY: -- and there has not been a security  
20 deposit for quite some time. That's one thing.

21 The other thing, Your Honor, is that the debtor  
22 knew that there were various terms that they needed to comply  
23 with under the terms of the lease agreement. One of them  
24 which they're talking about as far as subleasing, they don't  
25 have an absolute right that they can go out and sublease this

1 building. They need the landlord's consent.

2                 When they refer to the Urban Outfitters proposed  
3 sublease or in fact, sublease, they never got the landlord's  
4 consent. Urban Outfitters, when they found out that the  
5 debtor here had been just leading them down the road thinking  
6 that they had the landlord's consent, when they found out  
7 that they didn't have the landlord's consent after months and  
8 months of negotiations, and also from what I understand,  
9 months and months where the debtor was supposed to have done  
10 certain things, Urban Outfitters pulled out. Said I'm not  
11 dealing with Mr. Soto. We're not dealing with this debtor.  
12 So at that point, which was back in 2009 -- I believe it was  
13 in the spring or the summer of 2009 -- they walked away.

14                 We went in to court in August I believe of 2009  
15 before Judge Branston initially, requesting various  
16 injunctive relief. One of the things we requested is to stop  
17 the debtor from submitting documents to the Department of  
18 Buildings and somehow documents that were submitted contained  
19 forged signatures of my client.

20                 When counsel just referred to that the Department  
21 of Buildings won't permit them to submit any applications.  
22 The reason they won't submit them is because they have to go  
23 first to my client's principal in order for them to review it  
24 and for them to sign off and contact the DOB to submit the  
25 application.

1           This debtor, through Mr. Soto, does whatever  
2 wants, whenever he wants with total disregard for the fact  
3 that my client owns the building and that all he had was a  
4 lease. Now this past summer when we had served the notices  
5 to cure they did go in and they did the Yellowstone.

6           I was the attorney before Judge Branston on a  
7 four-day hearing. Mr. Soto testified on cross-examination  
8 for about two -- two-and-a-half days. The Court found him to  
9 be incredible. The Court denied the application for the  
10 Yellowstone and found that it was an incurable default  
11 because up until the last day that we were before Judge  
12 Branston they had yet to produce any sort of an insurance  
13 policy. So the judge issued a decision. I believe it's  
14 attached here.

15           The judge also ordered them to pay use and  
16 occupancy. Now they didn't comply with Judge Branston's  
17 order. We terminated the lease, per Judge Branston's  
18 decision. We were able to terminate. The lease was  
19 terminated. They continued in possession. They didn't do  
20 anything as far as trying to contact us to see if anything  
21 else could be resolved or try to go forward in any other way.

22           And we went to civil court -- to the state civil  
23 court on a holdover proceeding. They then come in and try to  
24 make an application to dismiss in civil court, which is part  
25 of what they do constantly. And the judge in civil court

1 directed them again to pay use and occupancy. Gave them time  
2 to put in opposition papers on our cross-motion. And they  
3 didn't do that. They didn't pay the use and occupancy.

4 The judgment was granted by Judge Oy (phonetic).  
5 We have a judgment of possession. We requested the issuance  
6 of a warrant and lo and behold, they filed the bankruptcy.

7 Now at this point, they've already violated two  
8 court orders in state court, albeit that they filed notices  
9 of an appeal. They filed the notice of appeal from the case  
10 back in 2009 with regard to the breach of the contract to  
11 purchase, but they haven't perfected. They have filed other  
12 notices of appeal, they haven't done anything to perfect.

13 He goes from counsel to counsel. If you look at  
14 the list of the creditors, he owes at least, what four or  
15 five attorneys in this city a lot of money for counsel fees.  
16 The list of creditors also, long list -- it looks like a long  
17 list of creditors. But the majority of them are entities  
18 that Mr. Soto has formed apart from this entity.

19 So at this point, Judge, we either need to be able  
20 to go back to state court to have the issues litigated -- for  
21 example, there's a tortious interference case that they  
22 started.

23 THE COURT: This is with respect to the Urban  
24 Outfitters sublet?

25 MS. DALEY: Correct. The court was ready to

1 render a decision on that on those mot- -- on the motions and  
2 cross-motions. The court didn't do it because they filed the  
3 bankruptcy, although they're the ones that started it, so  
4 they really should be able to pursue that in state court.

5                 But as far as my client is concerned, he can't  
6 defend at this point unless the stay is vacated. The stays  
7 here should be vacated. We should be permitted to go back to  
8 state court and let the state court do what the state court  
9 needs to do.

10                 But in the interim, they should be directed for  
11 the third time to pay use and occupancy. They should not be  
12 permitted to sit there.

13                 The building is deteriorating. The building still  
14 has certain violations on it. My client's hands are tied.  
15 He can't go in and do anything. They won't give over  
16 possession. Basically, they're holding the building hostage,  
17 that's what they're doing.

18                 THE COURT: Does your client have access to the  
19 building?

20                 MS. DALEY: No, Judge.

21                 THE COURT: Why doesn't he have access to the  
22 building, I'm asking?

23                 MS. DALEY: Your Honor, if I may take a sip of  
24 water?

25                 THE COURT: Of course.

1 MS. DALEY: Thank you.

2 MALE SPEAKER: Yes. Yeah, Judge, it's his  
3 building whenever he wants it.

4 THE COURT: Sir, could you identify yourself?

5 MR. LEINWAND: Sir?

6 THE DEBTOR: Yes, I'm John Soto. I'm the  
7 principal --

8 THE COURT: All right.

9 THE DEBTOR: -- on 2626 Broadway.

10 THE COURT: It strikes me that the landlord needs  
11 to have access to the building.

12 THE DEBTOR: If you want (indiscernible).

13 MR. LEINWAND: I'm -- we're advised that the  
14 landlord has access to the building, always has access to the  
15 building.

16 MS. DALEY: Really? When?

17 THE DEBTOR: What?

18 MR. LEINWAND: When?

19 THE DEBTOR: Whenever he asks to get in --

20 MS. DALEY: Unimpeded? No.

21 THE DEBTOR: -- Your Honor.

22 MR. LEINWAND: We will -- whenever we get a  
23 request for access to the building, Your Honor can direct,  
24 and I will so direct my client that they can have access to  
25 the building.

1                   THE COURT: Well I'm going to direct you right now  
2 that when the landlord wants access to the building that you  
3 make reasonable accommodation to allow the landlord to have  
4 prompt access to the building, period, full stop.

5                   MR. LEINWAND: That's fine. We unders- --

6                   MS. DALEY: And not just that, Your Honor, but  
7 also when my client personally goes he has his engineer go  
8 because they need to --

9                   THE COURT: Of course.

10                  MS. DALEY: -- engineer/architect. The last time,  
11 and that was part of what was before Judge Branston on that  
12 Yellowstone, was when we had that notice to cure because they  
13 wouldn't give us the access. The problem is, Mr. Soto won't  
14 let anybody go in other than my client's principal. That  
15 can't be permitted.

16                  THE COURT: Well as long as the principal is there  
17 and he's stating that he's bringing someone in with him to  
18 perform that kind of a service, then he's got to be permitted  
19 to get in. But look, on the record that I have today, Miss  
20 Daley is arguing very strenuously, but I don't have an  
21 evidentiary record yet. But --

22                  MS. DALEY: That was one of the things we were  
23 going to request, Judge.

24                  THE COURT: Okay.

25                  MS. DALEY: To have a hearing.

1                   THE COURT: Right. So I think that unless you  
2 want to respond to the argument, the position that has been  
3 taken with respect to the security deposit, because you  
4 acknowledged the -- right now, there's no security deposit.

5                   MR. LEINWAND: Your Honor, we don't know. I  
6 respect Miss Daley. I know Miss Daley. I don't question  
7 that she said that. We have issued subpoenas to determine  
8 when the security deposit was applied, how it was applied,  
9 and --

10                  THE COURT: She just told you.

11                  MR. LEINWAND: I hear it. I hear it. But we  
12 would like to get documentary evidence that that is in fact  
13 the fact.

14                  MS. DALEY: That was testified to before Judge  
15 Branston in state Supreme Court on the record. There were  
16 documents submitted.

17                  MR. LEINWAND: Fine.

18                  MS. DALEY: As I said, you know, you've come in at  
19 the last moment --

20                  MR. LEINWAND: I hear you.

21                  MS. DALEY: But --

22                  MR. LEINWAND: I just --

23                  THE COURT: Look, let -- you can't talk to each  
24 other. You just have to talk to me.

25                  MR. LEINWAND: Do it nicely. Yeah, I just -- if

1 that's the fact, if I had documentary -- you asked to  
2 respond. I have no personal knowledge that the million  
3 dollars has been --

4 THE COURT: All right, Miss Daley, this is what  
5 we're going to do for the first step, okay. I think  
6 365(d)(3) is very clear. So I'm going to ask Miss Daley to  
7 provide documentation to the debtor with respect to the  
8 application of the remainder of the security deposit after  
9 the initial 500,000, which I think they agree with you on  
10 that. So it will be the rundown of the remainder of the  
11 security deposit. Okay?

12 So that being said, there's nothing that you could  
13 apply to offset against the accrual of the post-petition  
14 rent. So under 354(d)(3) the debtor has to pay post-petition  
15 rent on the 60th day in the full amount that's due and owing,  
16 which I think is going to be, you know, putting to one side  
17 the issue with respect to the partial month, which we can  
18 leave for another day, at a minimum, right, it has to be the  
19 two months' rent.

20 MS. DALEY: September you're talking about?

21 THE COURT: Well we're talking about September.  
22 He's making the argument that because you filed on September  
23 3rd, --

24 MS. DALEY: Right, it's prorated.

25 THE COURT: Sorry?

1 MS. DALEY: Prorated.

2 THE COURT: Well if it's prorated then he's got to  
3 pay the prorate for September. He's got to pay October and  
4 he's got to pay what's due on November 1st. So he's got to  
5 pay the prorate for September, plus two months.

6 MR. LEINWAND: If it's prorated, the stub rent  
7 (indiscernible) will pay the --

8 THE COURT: The stub plus the two months.

9 MR. LEINWAND: I'll pay the two months. It -- I  
10 don't want -- the argument made -- the argument made and not  
11 finally decided by this Circuit or not finally decided by the  
12 Third Circuit is that since the payment date is the first day  
13 of the month, then the balance of that month is in fact an  
14 administration expense, but not a --

15 THE COURT: An expense for the purposes of  
16 365(d)(3)?

17 MR. LEINWAND: That's correct. And that's the  
18 argument that was made. That was the argument in -- what was  
19 the name of that (indiscernible) in Bali (phonetic) and that  
20 was the argument that the Second Circuit has adopted on the  
21 Second Circuit level.

22 THE COURT: All right, here's what I'm going to  
23 do. I'm not going to rule one way or the other on that  
24 today. And we're going to roll that question over into the  
25 subsequent hearing. But clearly, the two payments that have

1 to be made, clearly are the October and the November. So  
2 that's 48,250 times 2.

3 MR. LEINWAND: Right. We understand that, Your  
4 Honor.

5 THE COURT: Right? And that'll be due on the 60th  
6 day, which is November 2nd. Right?

7 MR. LEINWAND: I've got to add 60 --

8 THE COURT: It is.

9 MR. LEINWAND: -- September has 30 days.

10 THE COURT: October's got 31 days.

11 MR. LEINWAND: Okay. There you go.

12 THE COURT: So, I think November 2nd is the 60th  
13 day. Am I doing it right, Miss Daley?

14 MS. DALEY: Yes, Your Honor.

15 THE COURT: Okay. And look, that's the price of -  
16 - that's the cost of renting this courthouse to have a  
17 Chapter 11 case. Otherwise, you get to go back to state  
18 court and fight until the cows come home or until somebody  
19 renders a final judgment over there. But if you're filing a  
20 Chapter 11 petition and the statute makes clear what your  
21 obligations are as a debtor in possession, those have to be  
22 complied with before you get to the next step.

23 So the next step is going to be that promptly  
24 after the November 2nd day we're going to have an evidentiary  
25 hearing to determine either whether the stay should be lifted

1 under 362(d)(1) or whether this case should be dismissed as a  
2 bad faith filing. Because everything that's been said today,  
3 you know, some of which if true, I think could go to,  
4 certainly go to a bad faith filing.

5 Under 362(d)(1), as I'm sure you know, you have to  
6 make a showing that there is equity and that it's necessary  
7 to an effective reorganization. And so that's two parts.  
8 One that there's equity, and two, that it's necessary to a  
9 reorganization.

10 And the cases are clear under that prong that it's  
11 not just the debtor coming in and saying I've got this great  
12 idea. I've got a wing and a prayer and maybe I'll make this  
13 happen. But it's actually showing a reasonable prospect of a  
14 reorganization.

15 And in the context of that hearing I'm also going  
16 to want testimony on who the creditors really are in this  
17 case to the extent that there have been allegations that the  
18 creditors are insiders and other, or affiliates of the  
19 debtor, that's something that I'm going to need to hear more  
20 about. So I think between now and then you folks are  
21 probably going to want to do some discovery. Whether and how  
22 the Urban Outfitters chapter of this plays into it, you know,  
23 I'll leave to you.

24 MS. DALEY: I was going to make a suggestion, Your  
25 Honor.

1 THE COURT: Yes?

2 MS. DALEY: The case that is in state court, the  
3 case that was started by the debtor against my client is  
4 their claim for tortious interference, which is their claim  
5 to fame here. And our -- and my client through other counsel  
6 made an application to the court in order to dismiss the  
7 case.

8 THE COURT: Okay that, since they're the  
9 plaintiff, that action is not stayed by our being here,  
10 correct?

11 MS. DALEY: I don't see how the stay would apply,  
12 although the state court stayed it because of this, based  
13 upon correspondence, from what I understand was sent by  
14 counsel for debtor to the state court judge. What I would  
15 suggest that we let that case in state court, let the judge  
16 make their determination in state court.

17 THE COURT: I don't -- the stay's not --

18 MS. DALEY: Because if the --

19 THE COURT: -- they're the plaintiff. If they  
20 want to pursue that, the stay's not.

21 MS. DALEY: No, but I'm just saying because we --  
22 are we then stayed --

23 MR. LEINWAND: The state --

24 MS. DALEY: -- on this motion to dismiss in state  
25 court? We made the motion to dismiss that case. We

1 submitted documents. We submitted proof. It was a pre-  
2 answer motion.

3 THE COURT: I understand what you're saying.

4 Right.

5 MS. DALEY: So if the state court finds that their  
6 tortious interference claim has no merit, the state court, if  
7 we submit to the Court --

8 THE COURT: Well look, it's -- you're right. It  
9 is -- you're taking additional action in that action is  
10 stayed, unless you're going to consent --

11 MR. LEINWAND: We're going to do something with  
12 respect to that prior to November. And we're -- we will do  
13 that expeditiously.

14 MS. DALEY: What are we going to do?

15 THE COURT: Right, well --

16 MS. DALEY: The judge isn't going to render a  
17 decision because the debtor contacted the court --

18 THE COURT: Right. Well look, I mean you've got  
19 to -- you're at a crossroads here.

20 MR. LEINWAND: We are at a crossroads and I think  
21 that the time frame is short. I heard Your Honor clearly  
22 that, you know, on a --

23 THE COURT: I think you did.

24 MR. LEINWAND: -- number of issues. And I think  
25 that by November 2nd we will, as Yogi said, we will come to a

1 fork in the road and we will take it.

2 MS. DALEY: There's one other problem that came to  
3 my attention.

4 THE COURT: Yeah.

5 MS. DALEY: I think this was post submitting the  
6 motion, is that it appears that the debtor is trying to turn  
7 the place into a flea market and rent out booths in the  
8 building. Now the problem we have is we go back to the lease  
9 agreement --

10 THE COURT: Well if you've got consent -- if you  
11 got consent rights to sublets, then you have consent rights  
12 to sublets, right?

13 MS. DALEY: But we haven't consented to anything.  
14 So I would respectfully urge the Court to direct the debtor  
15 at this point --

16 THE COURT: Well, they -- it's part of the --

17 MS. DALEY: -- to take no actions.

18 MR. LEINWAND: We have obligations under the lease  
19 and -- and we (indiscernible) --

20 THE COURT: And --

21 MS. DALEY: But the --

22 MR. LEINWAND: We're not operating a flea market  
23 and we -- we don't --

24 THE COURT: Look, he -- you're representing to me  
25 on the record -- I'm about to tell you what you're

1 representing to me on the record. You're representing to me  
2 on the record that you are fully complying with the lease in  
3 all respects. That's what you -- that's what you have to be  
4 doing. That's what you have to be doing.

5 MR. LEINWAND: We understand our obligations under  
6 363 -- 365.

7 THE COURT: Three sixty-five (365).

8 MR. LEINWAND: We understand our obligations.

9 THE COURT: Okay.

10 MR. LEINWAND: And, you know, I don't want to say  
11 I'm -- there's so many technical violations, I can't tell you  
12 that I'm --

13 THE COURT: I understand.

14 MR. LEINWAND: -- complying with every technical -  
15 -

16 THE COURT: I'm not trying to --

17 MR. LEINWAND: But yes, we -- to the best of my  
18 knowledge, we will be complying with each and every provision  
19 of the lease.

20 THE COURT: All right. All right, so in the  
21 meantime --

22 MS. DALEY: I'm sorry, Judge.

23 THE COURT: Let me say something to both of you.  
24 To the extent that counsel has raised infirmities in service,  
25 all right, would you please correct those to the extent that

1 you -- that he is correct, so that I have a good record on  
2 service in time for the next hearing.

3 MS. DALEY: If there is an infirmity, I believe it  
4 may only be with respect to the dismissal portion. Not with  
5 regard to the lift stay portion.

6 THE COURT: Okay.

7 MS. DALEY: So whatever there is, we will deal  
8 with it --

9 THE COURT: All right.

10 MS. DALEY: -- prior to the next court date.

11 THE COURT: Okay. Excellent. Now what about are  
12 you folks going to be able to agree on any discovery that you  
13 need between now and November 2nd?

14 MS. DALEY: We received a subpoena last week which  
15 we were going to review and make an application to the court  
16 for appropriate relief on it. We believe that this subpoena  
17 is seeking information that he --

18 THE COURT: Why would you serve a -- okay, keep  
19 going.

20 MS. DALEY: It's either seeking information that  
21 they already had or information that has absolutely no basis  
22 under the terms of the lease agreement. Because if my  
23 client, which my client has had insurance on this building as  
24 the owner of the building, that insurance is totally  
25 different from the tenant's having insurance under the terms

1 of the lease.

2 THE COURT: So he, the tenants are obligated to  
3 have renters insurance?

4 MS. DALEY: The tenant is obligated to have  
5 insurance in accordance with the provision that was contained  
6 in the lease agreement, which they haven't had. They  
7 submitted policies -- and this was litigated even like the  
8 year before at the beginning of -- I think it was 2009 -- at  
9 the beginning of 2009, because they had gotten a Lloyds of  
10 London policy.

11 Now everybody hears Lloyds of London and says, oh  
12 gee, that's great. It's only one problem; they're not  
13 recognized or authorized in the state of New York. So if  
14 there's a claim then they can disclaim.

15 Now this building has a marquee, or a canopy.  
16 We've had problems because of the debtor's failure to  
17 maintain the marquee where it's at a bus stop and people --  
18 and he's got these lolly (phonetic) columns --

19 THE COURT: What's a lolly column?

20 MS. DALEY: It's a temporary support.

21 THE COURT: Okay.

22 MS. DALEY: But he's had these temporary supports  
23 now for I would say at least two, maybe three years, and has  
24 done nothing. The only thing this debtor did in that  
25 building was a demolition. A demolition that the debtor at

1 the 341 meeting claimed to have spent a million dollars on,  
2 which we believe there may be a problem with that statement  
3 and we will submit what we find to the Court at a later date.

4 THE COURT: If you -- if you ultimately were  
5 successful in prevailing on the position that the lease was  
6 terminated and it comes back to you, would there be a damage  
7 claim under the lease because the premises is not going to be  
8 turned back over to you in the cond- -- it --

9 MS. DALEY: A waste claim?

10 THE COURT: Something like that.

11 MS. DALEY: The landlord, the owner, would have  
12 claims against the debtor tenant, although the debtor tenant  
13 has nothing. I don't see where any claims would ever --

14 THE COURT: I mean the lease provides that the  
15 premises be returned --

16 MS. DALEY: Sure. They have to --

17 THE COURT: -- be turned back to you in a certain  
18 condition --

19 MS. DALEY: -- of course. Correct.

20 THE COURT: -- broom clean, etcetera?

21 MS. DALEY: There's also a guarantee. There's a  
22 personal guarantee that Mr. Soto signed as well. So, I mean,  
23 are there going to be future claims with regard to the waste  
24 that the debtor has permitted this building to fall into?  
25 There may be. At this point, our primary concern is getting

1 the building back.

2 THE COURT: All right.

3 MS. DALEY: And, you know, we talk about the  
4 value, well, it's a shell of a building at this point based  
5 on what they've done to the interior of it and their failure  
6 to maintain the exterior and the interior. And what value --

7 THE COURT: When they took it over, it was  
8 outfitted as a theater? In other words --

9 MS. DALEY: There was still, from what I  
10 understand, Your Honor, --

11 THE COURT: Uh-huh, (affirmative).

12 MS. DALEY: -- there was still --

13 THE COURT: Seats and what not in it?

14 MS. DALEY: -- seating. Correct.

15 THE COURT: Uh-huh, (affirmative). Okay.

16 MR. LEINWAND: Just briefly, Your Honor, because I  
17 don't want to argue this now.

18 THE COURT: None of this is evidence.

19 MR. LEINWAND: Okay.

20 THE COURT: Okay, this is just my trying to get a  
21 sense of what this is about.

22 MR. LEINWAND: The demolition plans were the --  
23 the landlord's [sic] demolition plans were approved. They  
24 knew they were going to demolish, that was the whole plan.

25 MS. DALEY: I'm not arguing against that.

1 MR. LEINWAND: Okay.

2 THE COURT: Okay.

3 MR. LEINWAND: And the insurance is -- is very  
4 important because it was the gravamen of the --

5 THE COURT: Of the Yellowstone.

6 MR. LEINWAND: -- judgment of possession. And it  
7 is the debtor's position that the landlord had insurance on  
8 the premises that would have satisfied --

9 THE COURT: Well one thing is clear that I also  
10 can't do, is if there -- if a state court judge has issued a  
11 ruling on that, I don't get to second guess that.

12 MR. LEINWAND: There's no -- no (indiscernible)  
13 here. We're not doing that. We're -- you know, the appeals  
14 are staying where they are. When there hasn't been a  
15 determination, that, Your Honor can hear. We understand  
16 that.

17 MS. DALEY: But they have done nothing to perfect  
18 --

19 THE COURT: Well that's going to be a fact that  
20 you can put on the record at the subsequent hearing. That  
21 goes to their good faith. Because if there are various  
22 appeals and they've done nothing to prosecute them, you know,  
23 they don't get to just run out the string in state court  
24 forever, but in the meantime come here. So let's go back to  
25 --

1 MR. LEINWAND: Okay, and so --

2 THE COURT: -- the issue of discovery. So if you  
3 -- if the discovery has been -- is improper, you under my  
4 case management orders and the way I know you both know how  
5 to practice law, you need to confer with each other and try  
6 to resolve the discovery disputes. Cooperate with each other  
7 with respect to documents, depositions, whatever it is. If  
8 you can't, call me and we can come here and resolve it. But  
9 I certainly would hope and expect that you could get to an  
10 agreement with respect to the exchange of documents and any  
11 depositions that you need.

12 I don't know if there has to be any additional  
13 briefing that you want to submit, but I would ask you to come  
14 up with a schedule for any additional briefing that you want  
15 to submit to me before a trial date. And let's look at the  
16 calendar.

17 MR. LEINWAND: Do I understand from what Miss  
18 Daley said that there's no problem with respect of our  
19 proceeding with the appeals, even though the appeals are  
20 essentially appeals from orders of the District Court in  
21 which the debtor was the defendant, which may require  
22 modification of the stay. With consent -- if I have consent  
23 of the landlord, we will proceed with those appeals.  
24 Otherwise, we will have to bring a motion to allow us to  
25 proceed with the appeals.

1 MS. DALEY: Your Honor, the problem that the  
2 debtor has here, let's take the civil court judgment of  
3 possession, with the order that they were supposed to pay use  
4 and occupancy. The debtor, I believe filed a notice of  
5 appeal. The debtor, I do not believe is going to move to  
6 perfect the appeal for one simple reason, if they do that and  
7 they try to apply to the appellate term for a stay, the  
8 appellate term will more than probably only grant them a stay  
9 so that they can remain in the building if they pay --

10 THE COURT: If they pay, right.

11 MS. DALEY: -- you know. As well as posting a  
12 bond to cover whatever arrears they owe from before. So  
13 counsel I don't believe has a --

14 THE COURT: So then, let's take a -- so then we  
15 should take him up on his offer. I mean first of all, I  
16 don't -- to go back to the applicability of my stay, right,  
17 why does my stay preclude you from perfecting that appeal?

18 MR. LEINWAND: Because we were a defendant in the  
19 action underneath in a stay of (indiscernible).

20 THE COURT: All right, but she's not doing  
21 anything.

22 MR. LEINWAND: I have --

23 THE COURT: The stay only precludes somebody  
24 taking an action right to interfere with property of the  
25 estate.

1 THE DEBTOR: No.

2 MR. LEINWAND: I agree with you. However, I don't  
3 think that's what the law is. I think that's what it should  
4 be. But --

5 THE COURT: All right, but do you -- okay --

6 MR. LEINWAND: But if she consents to it, I have  
7 no problem --

8 THE COURT: Are you consenting to him?

9 MS. DALEY: If he's going to make an appli- --  
10 he's going to perfect his appeal in state court?

11 THE COURT: He's asking right now --

12 MS. DALEY: Let him go perfect his appeal.

13 THE COURT: -- that he wants confirmation that his  
14 taking action to perfect the appeal is not a violation of the  
15 automatic stay.

16 MS. DALEY: I do not believe that it's a violation  
17 of the automatic stay.

18 THE COURT: All right. So --

19 MR. LEINWAND: Fine then, thank you, Your Honor.

20 THE COURT: All right. So to the ext- --

21 MS. DALEY: As I don't believe it's a violation of  
22 the automatic stay, although we don't want to risk, and  
23 that's what we're here --

24 THE COURT: Understood. That's --

25 MS. DALEY: -- on the other stay --

1 THE COURT: -- but that's different.

2 MS. DALEY: -- on the court with --

3 THE COURT: Right, but that's different. That's  
4 as to an action that you would be taking, right?

5 MS. DALEY: Our motion to dismiss?

6 THE COURT: Yes. You would be pros- -- taking  
7 action in the nature of prosecuting your motion to dismiss.

8 MS. DALEY: Although, Your Honor, the state court  
9 is equipped to interpret the state law on that topic.

10 THE COURT: Right.

11 MS. DALEY: So there should be -- the state court  
12 really should, they're either going to deny the application  
13 and direct us to file --

14 THE COURT: Right.

15 MS. DALEY: -- an answer.

16 THE COURT: Right, but that's in the nature of  
17 you're asking me to issue a -- lift the automatic stay so  
18 that that can proceed. But with respect to the appeal, I do  
19 not believe that the automatic stay precludes the debtor from  
20 taking steps to perfect that appeal in the state court. And  
21 to the extent that it does, you've now consented to --

22 MS. DALEY: He's got three appeals.

23 THE DEBTOR: (Indiscernible).

24 THE COURT: I don't think -- I think you can move  
25 forward and perfect those appeals.

1 MR. LEINWAND: Thank you, Your Honor.

2 THE COURT: All right. So I need to give you a  
3 date. I think that's --

4 MR. LEINWAND: Yeah, we need --

5 THE COURT: I'm sorry. I don't mean to cut you  
6 off.

7 MR. LEINWAND: Yeah. No, I -- we could do that if  
8 Your Honor gives us dates and we could back into it with some  
9 sort of scheduling order. I think that's what would make  
10 sense, if Miss Daley's okay with that with respect to, you  
11 know, the briefing and discovery. She's looking at her  
12 Blackberry.

13 THE COURT: Look, just so we're clear on the stay  
14 issue with respect to the appeals, why don't you prepare a  
15 stipulation and send it to Miss Daley for signature and I'll  
16 so order it. So that you have a piece of paper to show the  
17 various and sundry state court clerks, judges, whatever. So  
18 that there's a clear indication that it's not a violation of  
19 the automatic stay.

20 MR. LEINWAND: Right we would --

21 MS. DALEY: How about stipulating so that -- how  
22 about stipulating that Judge Yates (phonetic) in the state  
23 court can determine the issue on the tortious interference?

24 MR. LEINWAND: We're not going to do that, Your  
25 Honor. We're going to do something with respect to that

1 tomorrow.

2 THE COURT: All right. Well why don't you talk to

3 --

4 MR. LEINWAND: I will talk with --

5 THE COURT: -- you know, you'll talk --

6 MR. LEINWAND: -- I will talk with counsel about  
7 it.

8 THE COURT: -- talk to counsel about that. In  
9 terms of coming back here for an evidentiary hearing, how  
10 about November 9th?

11 MS. DALEY: I was just on that day, Judge.

12 THE COURT: November 9th, 10:00 o'clock or --

13 FEMALE SPEAKER: Are we open on that day --

14 THE COURT: November 9th at 10:00 o'clock?

15 MR. LEINWAND: Fine, Your Honor.

16 MS. DALEY: Yes, Your Honor.

17 THE COURT: Okay.

18 MS. DALEY: And that's for the hearing?

19 THE COURT: For the hearing. Unless, you know, I  
20 mean if, you know, if a miracle occurs and you're able to  
21 work something out before then, I'd be delighted to use that  
22 date to approve, you know, some kind of a global settlement.

23 But in the absence of that, and just so we're  
24 clear, the two months needs to be paid on or before November  
25 2nd and we're also reserving to November 9th the issue of to

1 what extent the prorate has to be paid under 365(d)(3). All  
2 right, if you need my help in further scheduling or discovery  
3 matters, please contact my chambers.

4 MR. LEINWAND: Thank you.

5 THE COURT: All right. All right, thank you  
6 folks. We're adjourned.

7 MS. DALEY: Thank you, Your Honor.

8 (Time noted: 12:03 p.m..)

9 \* \* \* \* \*

10 CERTIFICATE

11 I, RANDEL RAISON, certify that the foregoing is a  
12 correct transcript from the official electronic sound  
13 recording of the proceedings in the above-entitled matter, to  
14 the best of my ability.

15   
16 \_\_\_\_\_

October 29, 2010

17 Randel Raison

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